

**RE HJ KHALID ABDULLAH;
EX P DANAHARTA URUS SDN BHD**

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[BANKRUPTCY PROCEEDINGS NO: 29-54-05-III/II]
26 SEPTEMBER 2007

BANKRUPTCY: Notice - Notice of intention to oppose - Procedure - Whether sufficient to file notice of intention to oppose creditor's petition instead of filing summons in chambers under r. 18 Bankruptcy Rules 1969 - Doctrine of stare decisis - Whether notice bad in law

CONSTITUTIONAL LAW: Courts - Stare decisis - Exceptions to application of doctrine of stare decisis - True concept of doctrine - Dispensation of justice

CIVIL PROCEDURE: Preliminary objection - Procedural and technical objection - Non-compliance of procedural law per se - Whether cannot defeat substantive justice any more in court

CIVIL PROCEDURE: Preliminary objection - Notice to opponent - Rules of procedure - Whether preliminary objections must be taken with a formal application

BANKRUPTCY: Petition - Validity of creditor's petition - Whether filed after six months from date of act of bankruptcy - Whether time stopped running when SAR dismissed application and judgment debtor appealed to judge in chambers

BANKRUPTCY: Practice and procedure - Act of bankruptcy - When an act of bankruptcy comes into being

BANKRUPTCY: Practice and procedure - Act of bankruptcy - Whether creditor's petition must be filed within six months of act of bankruptcy

BANKRUPTCY: Notice - Setting aside - Application to set aside dismissed - Rights of debtor's appeal

BANKRUPTCY: Practice and procedure - Appeal - Application to set aside bankruptcy notice dismissed - Rights of debtor's appeal

CIVIL PROCEDURE: Appeal - Procedure - Application to set aside bankruptcy notice dismissed - Rights of debtor's appeal

- A This was an appeal by the judgment debtor against the decision of the senior assistant registrar ('SAR') dismissing the judgment debtor's "Notice By Debtor of Intention to Oppose Petition" ('encl. 50') filed pursuant to r. 117 of the Bankruptcy Rules 1969 ('BR'). The main reason encl. 50 was dismissed was due to a
- B preliminary objection by the judgment creditor on a procedural issue *ie*, whether it is sufficient to file a notice of intention to oppose a creditor's petition instead of filing a summons in chambers under r. 18 of the BR. The SAR, bound by the doctrine of *stare decisis*, followed two earlier Supreme Court and
- C Federal Court decisions respectively instead of a later Court of Appeal decision and, pursuant to the principles stated in the two apex court cases, concurred with the judgment creditor's submission that encl. 50 was bad in law and of no effect. Also, in this case, the bankruptcy notice was served on the judgment
- D debtor on 26 May 2005, who subsequently filed an application on 31 May 2005, pursuant to r. 18 of the BR, to set aside the bankruptcy notice dated 9 March 2005. The SAR dismissed the application on 5 October 2005 and, on appeal, the judge dismissed it on 24 February 2006. The judgment creditor only
- E filed the creditor's petition on 23 August 2006, which was after six months from the date of the act of bankruptcy. This *per se* was in breach of s. 3(1)(i) to be read with s. 5(1)(c) of the BA. However, the judgment creditor says that under r. 95 of the BR, time only ran from the time the application was set aside and the
- F fate of the application was only known on 24 February 2006. The issue, thus, was whether time stopped running when the SAR dismissed the application and the judgment debtor appealed to the judge in chambers.
- G **Held (allowing the appeal):**
- (1) In Malaysia, the establishment of superior courts is part of the written constitution and their sole objective is to dispense justice. No statute or procedural law or concept of *stare decisis* in its true sense, from the explicit wording of the Federal
- H Constitution, can restrain the court from hearing the merits of a case and dispensing justice on the facts and circumstances of the case. Thus, *stare decisis* must not be quoted to defend a wrong. It would not be now wrong to safely say that non-compliance of procedural law *per se* cannot defeat substantive
- I justice any more in court, unless the opposing party can

demonstrate that he suffered prejudice that cannot be compensated. Further, when it comes to issues relating to bankruptcy proceedings, if the debtor comes to court in person on the day of hearing of the bankruptcy petition and objects to being made a bankrupt, then the rule of natural justice will demand that the court hear him out before deciding on the discretionary relief. This is so bearing in mind that bankruptcy proceedings, if successful, would have harsh consequences. The object of the Bankruptcy Act 1967 ('BA') is only to secure fair and equal distribution of available property among creditors and that will only arise if the debtor is insolvent. If the debtor can genuinely demonstrate a valid defence in law, then the creditor should not have the benefit of the BA. Furthermore, the rules of procedure do not permit preliminary objections to be taken without a formal application. When a formal application is taken, that application will give ample notice to the opposite side to regularise the proceedings. In this case, a formal application was not taken by the judgment creditor. In such cases, the court must not entertain the preliminary objection of lawyers who like to be perfectionists, but do not make a formal application to defeat the substantive merits to be heard. (paras 6 & 7)

- (2) In relation to whether time stopped running when the SAR dismissed the application and the judgment debtor appealed to the judge in chambers, there is no answer to this question in the BA. This court is of the view that the moment such an application is dismissed, an act of bankruptcy comes into being, which entitles, indeed compels, the creditor to file the creditor's petition within six months of the act of bankruptcy. As to the rights of the debtor's appeal to the High Court judge, there is a *lacuna* in this area of law. In consequence, in order to preserve the integrity of the debtor's appeal against the dismissal of his application to set aside the bankruptcy notice, there ought not to be any hearing of the creditor's petition before the registrar or the judge, pending the hearing, disposal or withdrawal of the debtor's appeal. This approach would, on the one hand comply with the provisions of s. 3(1)(i) of the BA and r. 95 of the BR and allow the creditor to file his papers in time, and, on the other, prevent any injustice to the debtor. Should the debtor's appeal fail, the hearing of the petition could commence. If the debtor's

- A appeal succeeded, there would be no need to hear the creditor's petition. This approach is practical in that it saves the court's time from hearing a petition, the decision of which may afterwards be impugned, and it also preserves the rights of both the creditor and debtor. Support for this proportion is also found in s. 90(1) of the BA, under which there is a statutory stay of all decisions of the registrar when there is an appeal. (para 9)

Case(s) referred to:

- C *Abu Bakar Ismail & Anor v. Ismail Husin & Ors & Other Appeals* [2007] 3 CLJ 97 CA (**refd**)
Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC (**refd**)
Capital Insurance Bhd v. Asiah Abdul Manap & Anor [2000] 4 CLJ 1 FC (**refd**)
- D *D & C Bank Bhd v. Datuk Ong Kian Seng* [1995] 3 CLJ 307 FC (**refd**)
Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 3 CLJ 324 SC (**refd**)
Distributors (Baroda) Pvt Ltd v. Union of India and Ors AIR [1985] SC 1585 (**refd**)
- E *Guinness Anchor Marketing Sdn Bhd twn. Soh Leong Chet* [2003] 1 CLJ 655 HC (**refd**)
Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor [2001] 4 CLJ 1 CA (**refd**)
IC Golaknath & Ors v. State of Punjab Anrs [1967] 2 SCR 762 (**refd**)
J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA (**refd**)
- F *Lam Kong Company Ltd v. Thong Guan Co Pte Ltd* [2000] 3 CLJ 769 FC (**refd**)
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA (**refd**)
- G *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645; [2002] CLJ JT(2) FC (**refd**)
Megnaway Enterprise Sdn Bhd v. Soon Lian Hock [2003] 5 CLJ 103 HC (**refd**)
Mokhtar Amin v. Mohamed Mokhtar Omar [2001] 4 CLJ 489 CA (**refd**)
State of Orissa v. Dr (Miss) Binapani Dei AIR [1967] SC 1269 (**refd**)
- H *United Malayan Banking Corp Bhd v. Earnest Cheong Yong Yin* [2001] 2 CLJ 31 CA (**refd**)
Waman Rao & Ors v. Union of India & Ors AIR [1981] SC (1) 271 (**refd**)
Wong Ai Sung v. Orix Credit Malaysia Sdn Bhd [2007] 4 CLJ 52 HC (**refd**)

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Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), 5(1)(c), 90(1)
 Bankruptcy Rules 1969, rr. 18, 95, 117
 Federal Constitution, arts. 121, 122
 Rules of the High Court 1980, O. 2

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Other source(s) referred to:

Broom's Legal Maxims, 10th edn, pp 91, 92, 93

B

For the judgment debtor - CM Sundram; M/s CM Sundram & Co
Roland Thomas Tudin; M/s Besar Talip Tudin &
Advoc

For the judgment creditor - Lim Lip Sze; M/s Reddi & Co

C

Reported by Suresh Nathan

JUDGMENT

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Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the judgment debtor's appeal (encl. 66) against the decision of the learned senior assistant registrar who dismissed the judgment debtor's "Notice By Debtor of Intention to Oppose Petition" (encl. 50) filed pursuant to r. 117 of the Bankruptcy Rules 1969 (BR 1969).

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[2] The judgment debtor's objection to the creditor's petition is based on the following grounds namely:

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(i) The judgment creditor failed to comply with s. 5(1)(c) of the Bankruptcy Act 1967 (BA 1967). The judgment creditor is not entitled to present a creditors' petition against the judgment debtor as the alleged act of bankruptcy on which the creditors' petition is grounded had occurred more than six (6) months before the presentation of the creditors' petition dated 22 August 2006 (the creditors' petition was filed in court on 23 August 2006). The bankruptcy notice dated 9 March 2005 was served on the judgment debtor on 26 May 2005. The creditors' petition is irregular and/or defective as the creditors' petition was presented by the judgment creditor out of time.

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(ii) The judgment debtor denies that there was any act of bankruptcy committed by the judgment debtor on 24 February 2006. There was no such debt owed to the judgment creditor on the said date by virtue of an outside agreement entered between the judgment creditor and the judgment debtor.

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- A (iii) The judgment creditor holds securities for payment of the said sum. The said securities if realized are more than sufficient to cover or settle the debt outstanding, if any.
- B (iv) The affidavit of truth of statement in petition affirmed by the deponent is defective and/or bad in law as the deponent has no knowledge or source of knowledge to depose the said affidavit or to verify the several statements in the creditors' petition.
- C [3] The main reason for encl. 50 to have been disposed off is set out in the ruling of the learned senior assistant registrar and is based on technicality and preliminary objection. The relevant part of the same *inter alia* reads as follows:
- D On the hearing date of the CP, Mr. Lim Lip Tze, counsel for the JC raised a preliminary objection on procedural issue. According to him, encl 50 is invalid, ineffective, bad in law and ought to struck out. Learned counsel for the JC urged this Court to follow the Supreme Court decision in *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 3 CLJ 324 and Federal Court decision in *Development & Commercial Bank Berhad v. Datuk Ong Kian Seng* [1995] 3 CLJ 307. In both cases, the issue was whether it is sufficient to file a notice of intention to oppose the CP instead of filing a summons in chambers under r. 18 of the Rules. In *Datuk Ong Kian Seng's* case, citing the relevant passage from the judgment of the Supreme Court in *Datuk Lim Kheng Kim's* case, the Federal Court said:
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- G Rule 18 of the Rules further provides that except where the Rules or the Act provide, every application shall, unless the court otherwise direct, be made by motion supported by an affidavit. In *Datuk Lim Kheng Kim*, the Supreme Court held that failure to follow r.18, which requires an application to be made by motion supported by affidavit, renders an affidavit in opposition ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that the debtor has a counterclaim, set-off or cross-demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. This court has no reason to disagree with the decision and will follow it.
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- I On this specific point, learned counsel for the JD took an opposite view and he pointed out that, that the question of whether the mere filing of a notice in encl. 50 pursuant to r. 117 of the Rules is sufficient to oppose the petition was also

considered in the Court of Appeal decision in *Dato' Sri Teong Teck Leng v. Jupiter Securities Sdn. Bhd* [2003] 4 CLJ 34. There, it was held that:

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In the instant case, a notice of intention to oppose the creditor's petition pursuant to r. 117 was filed. That would be sufficient to entitle the debtor to oppose the petition. He does not have to file further a summons in chambers for the purpose.

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Thus, from the passages quoted above, the next issue for this Court to determine is whether to follow decisions in Court of Appeal or Supreme and Federal Courts. I am therefore compelled to say that I was bound by both authorities in Court of Appeal and Federal Court. However, my attention is drawn to a doctrine of *stare decisis*. I therefore, find it appropriate here to refer what was said by the Federal Court as a clear guidance on this issue. Firstly, Chang Min Tat FJ who delivered the Federal Court's judgment in the case of *Public Prosecutor v. Datuk Tan Cheng Swee & Anor* [1980] 1 LNS 58 had this to say:

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It is however necessary to reaffirm the doctrine of *stare decisis* which the Federal Court accepts unreservedly and which it expects the High Court and other inferior Courts in a common laws system such as ours, to follow similarly.

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Secondly, in the case of *Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd* [1997] 2 MLJ 829 at p 830 the Federal Court held as follows:

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It was necessary for each lower tier to accept loyally the decision of the higher tiers and chaotic consequences would follow should the lower tier fail in this duty. It was therefore not open to an intermediate court of appeal, such as the Court of Appeal in this country, to disregard a judgment of a final court of appeal such as the Federal Court on the ground that it was given *per incuriam*.

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In the light of the principle as enunciated in *Datuk Tan Cheng Swee's* case (*supra*), I cannot find any reason why I should not holding myself bound by the Supreme Court and Federal Court decisions being the highest courts of the land. Relying on what is stated in that case, it is my duty to decide this case according to the law and therefore I have come to conclusion that I was bound by *Datuk Lim Kheng Kim's* case (*supra*) and *Datuk Ong Kian Seng's* case (*supra*).

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- A Therefore, having given due regard to the interest of the JD as explained in the case of *Sobri Arshad v. Associated Tractors Sdn. Bhd* [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756 in which held that the statute relating to bankruptcy should be construed in a manner most favourable to the person affected, it is my view that, JC is correct in its submission that the JD's notice in encl. 50 is ineffective and bad in law and has no effect. It must follow that I
- B decided in favour of the JC and the JC's preliminary objection be allowed with costs.

- [4] To decide on the fate of this appeal, it is sufficient if I deal with four issues, namely: (i) the effect of the doctrine of *stare decisis* to r. 117 of the BR 1969. (ii) is there provision in procedural rules to take preliminary objection before the court without a formal application? (iii) whether the bankruptcy petition was presented within six months from the date of the act of
- C bankruptcy? (iv) whether judgment debtor has *locus* to proceed?
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- Much thought and jurisprudence has been pumped into this area of law by the learned author GK Ganesan in '*Bankruptcy Law in Malaysia and Singapore, A Sourcebook of Principles, Practice, Procedure, Cases & Materials*', 2001 Ed., Marsden Law Book Company Sdn.
- E Bhd. This work, although published in 2001, has remained, and I foresee, may well remain, the foremost practitioner's reference in bankruptcy law. I have relied much on this book to write this judgment.

F **Rule 117 – *Stare Decisis***

The manner the creditor's petition should be opposed has been clearly set out in r. 117 of the BR 1969 which states as follows:

- G 117 Debtor intending to show cause
- Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known
- H a copy of the notice three days before the day on which the petition is to be heard.

- Notwithstanding form 16 and r. 117 of the BR 1969, the Supreme Court in *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 3 CLJ 324 has held that a summons in chambers together with notice of intention to oppose the petition need to be filed (see
- I *Development & Commercial Bank Berhad v. Datuk Ong Kian Seng*

[1995] 3 CLJ 307). However, the Court of Appeal in *J. Raju M Kerpayya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104 was of the view that if the debtor wishes to oppose the petition, he must act in accordance with r. 117 of the BR 1969. The judgment creditor asserts that the doctrine of *stare decisis* must be followed. On the issue of *stare decisis*, I take the view that it is not an immutable concept having the authority and firmness which is assigned to a fiat of Parliament which is often reflected in statute which does not infringe on any of the Constitutional provisions. *Stare decisis* is nothing more than judge made law, which requires the decision of the apex court to be followed to ensure that there is certainty in the application of law to achieve substantive justice. This principle of *stare decisis* cannot tie the hands of individual judges of His Majesty in administering substantive justice when the decision of the apex court will perpetuate fraud or reward fraud or the decision *per se* can be said to be abhorrent to notions of justice and fair play or inconsistent with subsequent amendments to Act of Parliament or rules of procedure, etc. (See *Adorna Properties Sdn. Bhd. v. Boonsom Boonyanit* [2001] 2 CLJ 133, *Lam Kong Company Ltd. v. Thong Guan Co. Pte. Ltd.* [2000] 3 CLJ 769 and *Capital Insurance Bhd v. Asiah Abdul Manap & Anor.* [2000] 4 CLJ 1 – Article [2001] MLJ 1: xlix). This is so because each and every judge has taken an oath of office individually and not collectively to protect the Constitution. When an apex court decision is fatally flawed and will cause substantive injustice, then the *stare decisis* principle cannot override the constitutional responsibility of a judge, for if he does so, it will be in breach of his oath of his office. When the English Courts were dealing with the sanctity of the principles of *stare decisis*, they were not focused on issues relating to appellate courts' decisions which promote fraud or rewards fraud or the enforcement of the decision of the appellate court will cause substantive miscarriage of justice, the nature of which any courts ought not to condone or entertain. Thus, to apply the principles of *stare decisis* to such cases will, in my view, be in breach of sacrosanct oath of the office of the judge. Further, perpetration of illegality is no part of the doctrine of *stare decisis*. Support for my proposition can be found in various cases and writings. Some of them are as follows:

- (i) In *Distributors (Baroda) Pvt. Ltd. v. Union of India and Ors* AIR [1985] SC 1585, Bhagwati J at pp 1597 and 1598 observed:

A But, even if in our view the decision in *Cloth Traders* case is erroneous, the question still remains whether we should overturn it. Ordinarily we would be reluctant to overturn a decision given by a Bench of this Court, because it is essential that there should be continuity and consistency in judicial decisions and law should be certain and definite.

B It is almost as important that the law should be settled permanently as that it should be settled correctly. But there may be circumstances where public interest demands that the previous decision be reviewed and reconsidered. The doctrine of *stare decisis* should not deter the Court from overruling an earlier decision, if it is satisfied that such decision is manifestly wrong or proceeds upon a mistaken assumption in regard to the existence or continuance of a statutory provision or is contrary to another decision of the Court. It was Jackson, J. who said in his dissenting opinion in *Massachusetts v. United States* [1947] 333 U.S. 611: "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday". Lord Denning also said to the same effect when he observed in *Ostime v. Australian Mutual Provident Society* [1960] AC 459: "The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff".

(ii) In *Broom's Legal Maxims* (10th edn) pp. 91 to 93, it is stated:

F Accordingly where a rule has become settled law, it is to be followed, although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason for it is wanting, or although the principle and the policy of the rule may be questioned. ...

G The judicial rule – *stare decisis* – does, however, admit of exceptions, where the former determination is most evidently contrary to reason. But, even in such cases, subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For, if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined.

(iii) In *I.C. Golaknath & Ors. v. State of Punjab Anrs.* [1967] 2 SCR 762, Wanchoo J at pp 816 and 817 observed:

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A final appeal is made to us that we shall not take a different view as the decision in *Sankari Prasad's case* [1952] SCR 89, 195 held the field for many years. While ordinarily this Court will be reluctant to reverse its previous decision, it is its duty in the constitutional field to correct itself as early as possible, for otherwise the future progress of the country and the happiness of the people will be at stake. As we are convinced that the decision in *Sankari Prasad's case* [1952] SCR 89, 195 is wrong, it is pre-eminently a typical case where this Court should overrule it. The longer it holds the field the greater will be the scope for erosion of fundamental rights. As it contains the seeds of destruction of the cherished rights of the people the sooner it is over-ruled the better for the country.

This argument is answered by the remarks made by this Court in the recent judgment in *The Superintendent and Legal Remembrancer State of West Bengal v. The Corporation of Calcutta* [1967] 2 SCR 170, 176.

The third contention need not detain us for it has been rejected by this Court in *The Bengal Immunity Company Limited v. The State of Bihar* [1955] 2 SCR 603. There a Bench of 7 Judges unanimously held that there was nothing in the Constitution that prevented the Supreme Court from departing from a previous decision of its own if it was satisfied of its error and of its baneful effect on the general interest of the public. If the aforesaid rule of construction accepted by this Court is inconsistent with the legal philosophy of our Constitution, it is our duty to correct ourselves and lay down the right rule. In constitutional matters which affect the evolution of our polity, we must more readily do so than in other branches of law, as perpetuation of a mistake will be harmful to public interests. While continuity and consistency are conducive to the smooth evolution of the rule of law, hesitancy to set right deviation will retard its growth. In this case, as we are satisfied that the said rule of construction is inconsistent with our republican polity and, if accepted, bristles with anomalies, we have no hesitation to reconsider our earlier decision.

- (iv) In *Waman Rao and Ors. v. Union of India & Ors.* AIR [1981] SC (1) 271, P.N.Y.V. Chandrachud, CJ at pp 287 to 289 stated:

- A 37. The doctrine of *stare decisis* is the basis of common law. It originated in England and was used in the colonies as the basis of their judicial decisions. According to Dias, (*Jurisprudence* by R.W.M. Dias 4th Ed. (1976) p. 166) the genesis of the rule may be sought in factors peculiar to
- B English legal history, amongst which may be singled out the absence of a Code. The Normans forbore to impose an alien code on a half-conquered realm, but sought instead to win as much wide-spread confidence as possible in their administration of law, by the application of near uniform rules. The older the decision, the greater its authority and
- C the more truly was it accepted as stating the correct law. As the gulf of time widened, says Dias, Judges became increasingly reluctant to challenge old decisions. The learned author cites the example of Bracton and Coke who always preferred older authorities. In fact, Bracton had compiled a Notebook of some two thousand cases as material for his treatise and employed some five hundred of them.
- D
- E 38. The principle of *stare decisis* is also firmly rooted in American Jurisprudence. It is regarded as a rule of policy which promotes predictability, certainty, uniformity and stability. The legal system, it is said, should furnish a clear guide for conduct so that people may plan their affairs with assurance against surprise. It is important to further fair and expeditious adjudication by eliminating the need to relitigate every proposition in every case (See *Introduction to Law and the Legal System*, by Harold J. Grilliot, 2nd Ed. (1979), p. 132). When the weight of the volume of the
- F decisions on a point of general public importance is heavy enough, courts are inclined to abide by the rule of *stare decisis*, leaving, it to the legislature to change long-standing precedents if it so thinks it expedient or necessary. In *Burnet v. Coronado Oil and Gas Co.* [1932] 285 US 893 at p. 406, Justice Brandeis stated that '*stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'
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- H 39. While dealing with the subject of *stare decisis*, Shri H.M. Seervai in his book on '*Constitutional Law of India*' 2nd Edition (1975), Vol. I, pages 59-60) has pointed out how important it is for judges to conform to a certain measure of discipline so that decisions of old standing are not overruled for the reason merely that another view of the,
- I matter could also be taken. The learned author has cited an Australian case in which it was said that though the court

has the power to reconsider its own decisions, that should not be done upon a mere suggestion that some or all of the members of the later court may arrive at a different conclusion if the matter were *res integra* (*The Tramways Case* (No. 1) - [1914] 18 CLR 54, per Griffith CJ at 58). The learned author then refers to two cases of our Supreme Court in which the importance of adherence to precedents was stressed. Jagannadhas J said in the *Bengal Immunity case* [1955] 2 SCR 603: (AIR [1955] SC 661) that the finality of the decisions of the Supreme Court, which is the Court of last resort, will be greatly weakened and much mischief done if we treat our own judgments, even though recent, as open to reconsideration. B.P. Sinha J said in the same case that if the Supreme Court were to review its own previous decisions simply on the ground that another view was possible, the litigant public may be encouraged to think that it is always worthwhile taking a chance with the highest Court of the land. In *I. T. O. Tuticorin v. T.S.D. Nadar* AIR [1968] SC 623, Hegde J, said in his dissenting judgment that the Supreme Court should not overrule its decisions except under compelling circumstances. It is only when the Court is fully convinced that public interest of a substantial character would be jeopardised by a previous decision, that the Court should overrule that decision. Reconsideration of the earlier decisions, according to the learned Judge, should be confined to questions of great public importance. Legal problems should not be treated as mere, subjects for mental exercise. An earlier decision may therefore be overruled only if the Court comes to the conclusion that it is manifestly wrong, not upon a mere suggestion that if the matter were *res integra* the members of the later court may arrive at a different conclusion.

40. These decisions and texts are of high authority and cannot be overlooked. In fact, these decisions are themselves precedents on the binding nature of precedents.

41. It is also true to say that for the application of the, rule of *stare decisis*, it is not necessary that the earlier decision or decisions of long standing should have considered and either accepted or rejected the particular argument which is advanced in the case on hand. Were it so, the previous decisions could more easily be treated as binding by applying the law of precedent and it will be unnecessary, to take: resort to the principle of *stare decisis*. It is, therefore, sufficient invoking the rule of *stare decisis* that a certain decision was arrived at on a question which arose or was argued, no matter on what reason the decision

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A rests or what is the basis of the decision. In other words,
for the purpose of applying the rule of *stare decisis*, it is
unnecessary to enquire, or determine as to what was the
rationale of the earlier decision which is said to operate as
stare decisis. Therefore, the reason why Article 31A was
B upheld in the earlier decisions, if indeed it was, is not
germane for the purpose of deciding whether this is a fit
and proper case which to apply that rule.

But, there are four principal reasons why we are not
disposed to invoke the rule of *stare decisis* for deciding upon
the constitutionality of Article 31A. In the first place, Article
C 31A breathes its own vitality, drawing its, sustenance from
the basic tenets of our Constitution. Its unstated premise is
an integral part of the very making of the Constitution and
it holds, as it were, a mirror to the ideals which inspired
the framing of the Constitution.

D 42. The second reason why we do not want to resort to
the principle of *stare decisis* while determining the validity of
Article 31A is that neither in *Shankari Prasad* (AIR [1951]
SC 450), nor in *Sajjan Singh* (AIR [1965] SC 845), nor in
E *Golak Nath* (AIR [1967] SC 1643), and evidently not in
Kesavananda Bharati (AIR [1973] SC 1461), was the
question as regards the validity as such of Art. 31A raised
or decided. As stated earlier, *Shankari Prasad* involved the
larger question as to whether constitutional amendments fall
within the purview of Art. 13(2) of the Constitution. It was
F held they did not. In *Sajjan Singh*, the demand for
reconsideration of the decision in *Shankari Prasad* was
rejected, that is to say, the Court was not inclined to
consider once again whether constitutional amendments are
also comprehended within the terms of Article 13(2). *Golak*
G *Nath* raised the question as to where the amending power
was located and not whether this or that particular
amendment was valid. In none of these decisions was the
validity of Article 31A put in issue. Nor indeed was that
question considered and decided in any of those cases. A
deliberate judicial decision made after hearing argument on
H a question which arises in the case or is put in issue may
constitute a precedent; and the precedent by long
recognition may, mature into *stare decisis*. But these cases
cannot be considered as having decided, reasons apart, that
the 1st Amendment which introduced Article 31A into the
I Constitution is valid.

43. Thirdly, the history of the World's constitutional law shows that the principle of *stare decisis* is treated as having a limited application only. Justice William Douglas said in *New York v. United States* [1946] 326 US 572 at pp. 590-591 that it is a wise policy to restrict the principle of *stare decisis* to those areas of the law where correction can be made by legislation. Otherwise, the constitution loses the flexibility which is necessary if it is to serve the needs of successive generations. It is for that reason again that Justice Frankfurter said in *US v. International Boxing Club* [1955] 348 US 236 at p. 249 that the doctrine of *stare decisis* is not 'an imprisonment of reason. Older the standing of a decision, greater the provocation to apply the rule of *stare decisis*. A possible mischief arising out of this position was pointed out by Justice Benjamin Cardozo in *Mac Pherson v. Buick Motor Co.* [1916] 217 NY 382 at p. 391, by saying that precedents drawn from the days of travel by stage – coach do not fit the conditions of travel today. And alive to that possibility, Justice Brandeis said in *State of Washington v. W.C. Dawson and Co.* [1924] 264 US 219 at p 238 that *stare decisis* is merely a wise rule of action and is not a universal, inexorable command. "The instances in which the court has disregarded its admonition are many". In fact, the full form of the principle, "*stare decisis et non quieta movere*" which means "to stand by decisions and not to disturb what is settled" was put by Coke in its classic English version as: "Those things which have been so often adjudged ought to rest in peace". Such being the justification of the rule, it was said in *James Monroe v. Frank Pape* [1961] 5 L Ed 2d 492 at pp. 523-524 that the relevant demands of *stare decisis* do not preclude consideration of an interpretation which started as an unexamined assumption. We have already pointed out how the constitutional validity of Article 31A has to be deemed to have been upheld in *Shankari Prasad* (AIR [1951] SC 458) by a process of inferential reasoning the real question therein being whether the expression 'law' in Article 13 (2) includes law made in the exercise of constituent power.

44. The fourth reason is the one cited by Shri Tarkunde that on principle, rules like *stare decisis* should not be invoked for upholding constitutional devices like Articles 31A, 31B and 31C which are designed to protect not only past laws but future laws also. Supposing Art. 31A were invalid on the ground that it violates the Constitution's basic structure, the fact that its validity has been recognised for a long time cannot justify its protection being extended to

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- A future laws or to laws which have been recently passed by the legislature. The principle of *stare decisis* can apply, if those laws have enjoyed the protection of these articles for a long time, but the principle cannot apply to the articles themselves. The principle of *stare decisis* permits the saving of laws the validity of which has been accepted or recognised over the years. It does not require or sanction that, in future too, laws may be passed even though they are invalid or unconstitutional. Future perpetration of illegality is no part of the doctrine of *stare decisis*.
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- C (v) In *Abu Bakar Ismail & Anor v. Ismail Husin & Ors & Other Appeals* [2007] 3 CLJ 97, Justice Gopal Sri Ram JCA at p. 116 opined:
- D As such, in impugning the decision in *Adorna Properties*, I would take refuge in the following words of the great jurist Sir John Salmond in his *Treatise on Jurisprudence* (12th edn) at pp. 151-2:
- E A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute, ie, delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case (*London Street Tramways v. L. C. C.* [1898] AC 375) and for the Court of Appeal it was given as the leading example of a decision *per incuriam* which would not be binding on the Court (*Young v. Bristol Aeroplane Co. Ltd.* (194) KR at 729 (CA)). The rule apparently applies even though the earlier Court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute. Similarly, a Court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such *incuria* as to vitiate the decision. **Even a lower Court can impugn a precedent on such grounds.** (emphasis added.)
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- H [5] In crux, I will assert that the concept of *stare decisis* must be followed unless the exception stated applies. That exception must be of such a nature that judicial conscience of the trial judge will not permit him to act in breach of his oath of office. If the exception applies, then it is the duty of the trial court to state in clear terms as to why on the facts of the case, he or she declined to abide by the doctrine of the *stare decisis*. By doing so, it will
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give another opportunity to the apex court to revisit the decision to regularise the discrepancies, for one must not forget that *stare decisis*, as stated earlier, simply does not apply to a single decision of apex court which had instantaneously come into force but is based on reliable principles tested by a period of time. (See *Waman Rao and Ors (supra)*). In *Wong Ai Sung v. Orix Credit Malaysia Sdn Bhd* [2007] 4 CLJ 52, I have dealt with such issues and the relevant paragraph is reproduced below:

Further, subordinate courts are bound to follow the decisions of its apex courts and they have limited discretion to apply the *per incuriam* rule and if they do so it is necessary and essential to give detailed reasons for departing.

[6] The Supreme Court's decision in *Datuk Lim Kheng Kim (supra)* on procedural point was made in the year 1993, where courts were readily dismissing an action for non-compliance of procedural rules. I have not forgotten the sacrosanct effect to the "one inch margin rule" some judges were prepared to give importance to. But things have changed now. Various provisions of the rules of procedure have been amended to cater to substantive justice. The Chief Justice Yang Amat Arif Tun Dato' Sri Ahmad Fairuz, whilst sitting in the Court of Appeal in the case of *United Malayan Banking Corporation Bhd. v. Earnest Cheong Yang Yin* [2001] 2 CLJ 31 has shown the lead and rightly said that procedural and technical objections must not be allowed to obstruct the process of giving justice. Justice Abdul Hamid Mohamad PCA, sitting in the Court of Appeal, in the case of *Hock Seng Construction Sdn. Bhd. & Anor v. Yeoh Poh Owi & Anor*. [2001] 4 CLJ 1 had boldly asserted that the main function of the court is to do justice and not just to dispose off cases. Further, His Lordship has aptly observed that it is unjust to dismiss an appeal without even hearing the arguments on merits, simply because of the mistake of the solicitor in not complying with the rules. Justice Gopal Sri Ram JCA, who is an ardent supporter of procedural fairness in all his decisions in the last decade had in *Mokhtar Amin v. Mohamed Mokhtar Omar* [2001] 4 CLJ 489 placed the nail on the coffin in respect of procedural objections by stating that non-compliance of procedural requirements should not be treated as invalidating any action or proceeding or steps taken therein, unless it occasions a substantial miscarriage of justice. Further, His Lordship in the case of *Maril-Rionebel and other appeals* (See *Maril-Rionebel (M) Sdn. Bhd. & Anor v. Perdana Merchant*

- A *Bankers Bhd. & Other Appeals* [2001] 3 CLJ 248) had stated that there is an unhealthy trend for practitioners to raise several points either on different applications, or by way of preliminary objections on procedural grounds in the same proceedings. His Lordship had condemned the practice and has observed that such a practice constitutes an abuse of the courts' process, leading to injustice and should not be countenanced by judges. His Lordship in the judgment has directed judges at first instance and Magistrates not to entertain these so-called preliminary objections, save where they go to the jurisdiction of the particular court. In *Megnarway Enterprise Sdn. Bhd. v. Soon Lian Hock* [2003] 5 CLJ 103 it was stated that where technicalities raised are strictly in relation to non-compliance, disregarding them would not occasion any miscarriage of justice. (See *Guinness Anchor Marketing Sdn. Bhd. lwn. Soh Leong Chet* [2003] 1 CLJ 655). Tan Sri Datuk Seri Mohtar Abdullah FCJ, in the case of *Megat Najmuddin Dato' Seri (Dr.) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645; [2002] CLJ JT(2) had outlined the fundamental function of the Federal Court. His Lordship in the illuminating judgment had stated that the apex court must ensure that justice is done without placing too much stress on procedural technicalities. Further, His Lordship opined that once a case appears before the court, the only aspect that need concern the court is how fairly justice can be granted to those who seek it, by discriminating the right from the wrong. Further, His Lordship stressed that the Federal Court had the power and jurisdiction to do justice and should not be distracted by technicalities or the strict adherence to procedures. The apex court's decision establishes the basic principles that the function of the court is to decide the rights of the parties and not to punish them for errors they make in the conduct of their case. In England, procedural law was developed by way of case laws, statutes, Rules of Court, Practice Directions etc. Thus, the English decisions on procedural law are always subject to judicial precedents and procedural law and the courts in that sense is not the supreme arbiter, in contrast to Malaysia, taking into consideration that fact that England does not have a Constitution. In Malaysia, the establishment of superior courts is part of our written constitution. The sole objective of the courts is to dispense justice. No statute or procedural law or concept of *stare decisis* in its true sense, from the explicit wording of the Federal Constitution, can restrain the court from hearing the merits of the case and dispense justice on the facts and circumstance of

the case. Thus, *stare decisis* must not be quoted to defend a wrong, when the employment of the apex court decision will not subscribe to substantive justice for the reasons which I have explained earlier. (See arts. 121 and 122 of the Federal Constitution). It must also be emphasised here that *stare decisis* principle does not stand as a universal principle for the administration of justice. There are many faiths of jurisprudence which do not recognise the *stare decisis* concept. For example, Islamic jurisprudence does not recognise *stare decisis* principle. It is based on sound legal reasoning which is not necessary for me to set out here for the purpose of this judgment.

[7] It will now not be wrong to safely say that non-compliance of procedural law *per se* cannot defeat substantive justice any more in His Majesty's court, unless the opposing party can demonstrate that he suffered prejudice which cannot be compensated. Further, when it comes to issues relating to bankruptcy proceedings, I will go to the extent of saying that if the debtor comes to court in person on the day of hearing of the bankruptcy petition and objects to him being made a bankrupt, then the rule of natural justice will demand that the court hear him out before deciding on the discretionary relief. (See *State of Orissa v. Dr. (Miss) Binapani Dei* AIR [1967] SC 1269). This is so, bearing in mind that bankruptcy proceedings, if successful, would have harsh and penal consequences. Once adjudicating order and receiving order is granted, the debtor becomes incapacitated and to some extent deprived of his constitutional rights. As the object of the BA 1967 is only to secure fair and equal distribution of available property among creditors and that only will arise if the debtor is insolvent. If the debtor can genuinely demonstrate a valid defence in law then the creditor should not have the benefit of the BA 1967. Further, I take the view that rule of procedure does not permit preliminary objections to be taken without a formal application. (See Rules of the High Court 1980 (RHC 1980) O. 2). When a formal application is taken, that application will give ample notice to the opposite side to regularise the proceedings. In this case, a formal application was not taken by the judgment creditor. In such cases, the court must not entertain the preliminary objection of lawyers who like to be a perfectionist, but does not make a formal application to defeat substantive merit to be heard.

A *Locus Standi*

[8] On the issue of whether the judgment debtor has *locus* to proceed with the appeal, I have dealt with the issues on 9 July 2007 in the case of Kuching High Court BP No. 29-266-2006-II
B *Re Naspu bin Daud Ex-parte Affin Bank Berhad* and the relevant part is reproduced and reads as follows:

13. On the issue whether sanction from DGI is necessary to make an application to set aside the said order, the relevant provision the court must consider is section 38(1)(a) of the
C BA 1967 which states:

(1) Where a bankrupt has not obtained his discharge:
(a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of
D an injury to his person) without the previous sanction of the Official Assignee.

This section in my view is not a substantive law but a procedural requirement to maintain an action. It does not prohibit the bankrupt to sue or to defend. As a general rule, procedural requirement cannot and must not be elevated to the status of substantive law. The BA 1967 contains provision to condone non-compliance. This is specifically provided for in section 131 of the Act which states:
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No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.
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The ultimate decision maker whether or not to entertain the bankrupt's application is the court and not the DGI. Thus, to say a person cannot be heard without sanction from DGI cannot be correct in law. The court can condone such non-compliance if it wants to do for reasons stated in section 131 of BA 1967.
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14. In all the above cases mentioned, the courts did not discuss whether sanction is a substantive law or only procedural requirement which can be condoned pursuant to section 131 of BA 1967. On the facts of this case, I take the view:
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- (i) Sanction is not necessary for any application made pursuant to the bankruptcy proceedings itself as stated in the case of *Re Khoo Kim Hock (supra)*. A
- (ii) Section 38 is not a substantive law but only a procedural requirement. The court can condone non-compliance. This at times may be necessary because of the practical difficulties in obtaining consent. In almost all cases, practitioner will attest that sanction will not be ordinarily forthcoming from the DGI's office for various reasons; amongst that are as follows: (i) short of manpower to attend to the matters immediately (ii) not able to obtain the relevant papers and the views of creditor to make an early decision, etc. B C
- (iii) The court may, if it deems fit and proper, place conditions before hearing the bankrupt by ordering the costs of the proceedings which the bankrupt has to mete in the event his action or application does not succeed. Such costs in the ordinary cause must be paid by third parties on behalf of the bankrupt. In addition, the court can issue show cause letter for the Office of DGI to be present and explain why sanction was not granted and make the necessary orders according to the justice of the case. What is important for the court to consider when making such directions or orders is to make sure that the bankrupt does not deplete his estate by filing or defending actions and thereby prejudice the interest of his creditors. D E F
- (iv) the learned judge of the Court of Appeal in *Priyakumary's* case (*supra*) has made it clear that it is for the bankrupt to demonstrate to the court the steps he had taken to comply with the provision of section 38(1)(a). This in my view is a condition precedent before any orders can be made as suggested above, unless it is an application under section 92(1) or section 105(1) BA 1967 or its like. G

Act Of Bankruptcy

[9] In this case, the bankruptcy notice was served on the judgment debtor on 26 May 2005. The judgment debtor had filed an application dated 31 May 2005, pursuant to r. 18 of the BR 1969 to set aside the bankruptcy notice dated 9 March 2005. The learned senior assistant registrar dismissed the application on 5 October 2005. On appeal, the learned judge dismissed it on H I

- A 24 February 2006. The judgment creditor only filed the creditor's petition on 23 August 2006. This is after six months from the date the act of bankruptcy was committed. This *per se* is in breach of s. 3(1)(i) of the BA 1967 to be read with s. 5(1)(c) of the BA 1967. However, the judgment creditor says that under r. 95 of the BR 1969, time only runs from the time the application is set aside and the fate of the application was only known on 24 February 2006 when the learned judge dismissed the appeal. The said rule reads as follows:
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- C (1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.
- D (2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.
- E In this case, an affidavit under r. 95 of the BR 1969 was not filed but an application under r. 18 to set aside the bankruptcy notice was filed. Even assuming that the affidavit in support of the application can stand as a r. 95 affidavit, as r. 95 is related to the application to set aside a bankruptcy notice which also can be
- F done by r. 18 procedure, the act of bankruptcy will be deemed to have been committed from the time the learned senior assistant registrar dismissed the application. The issue here is whether when the learned senior assistant registrar dismissed the application and the judgment debtor appeals to the judge in chambers, does time
- G stop running? There is no answer to this question in the BA 1967. I take the view that the moment the application is dismissed, an act of bankruptcy come into being, which entitles, indeed compels the creditor to file the creditor's petition, within six months of the act of bankruptcy. As to the rights of the debtor's appeal to the
- H High Court judge, I would go further and say this that there is a *lacuna* in this area of law. In consequence, it is my judgment that in order to preserve the integrity of the debtor's appeal against the dismissal of his application to set aside the bankruptcy notice, there ought not to be any hearing of the creditor's petition before
- I the registrar or the judge, pending the hearing, disposal or withdrawal of the debtor's appeal. This approach would on the

one hand, comply with the provisions of s. 3(1)(i) and r. 95, and allow the creditor to file his papers in time, and at the same time prevent any injustice to the debtor. Should the debtor's appeal fail, the hearing of the petition can commence. If the debtor's appeal succeeds, then there is no need to hear the creditor's petition. This approach is practical in that it saves the court's time from hearing a petition, the decision over which may afterwards be impugned; it also preserves the rights of both the creditor and debtor. Support for the proposition is also found in s. 90(1) of BA 1967 which reads as follows:

The Registrar shall have the powers and jurisdiction in this section mentioned, and any order made or act done by him in the exercise of the said powers and jurisdiction shall, subject to an appeal ... be deemed the order or act of the court.

Under the above section, there is a statutory stay of all decisions of the registrar when there is an appeal.

[10] In conclusion, I will say that both parties have presented the arguments well. I have read the submission of the parties in detail and I take the view that the appeal must be allowed with costs. The order of the learned senior assistant registrar dated 30 November 2006 must be set aside. The getting up fees must not exceed RM10,000. If costs cannot be agreed, the judgment debtor is at liberty to tax the costs. I hereby order so.

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